

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

OYD COLLINS McCRAY,

Petitioner,

v.

CASE NO. 03-73490  
HONORABLE ARTHUR J. TARNOW

DOUGLAS VASBINDER,

Respondent.

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**ORDER GRANTING PETITIONER'S APPLICATION  
FOR A CERTIFICATE OF APPEALABILITY**

Petitioner Oyd Collins McCray has appealed the Court's denial of his Motion for Relief from Judgment, which he filed pursuant to Federal Rule of Civil Procedure 60(b). Currently pending before the Court is Petitioner's Application for a Certificate of Appealability.

Petitioner "must obtain a certificate of appealability before his appeal of the denial of his Rule 60(b) motion can be heard." *United States v. Hardin*, 481 F.3d 924, 926 (6th Cir. 2007). And to obtain a certificate of appealability, Petitioner "must demonstrate that reasonable jurists could disagree with the district court's resolution of his constitutional claims or that the issues presented warrant encouragement to proceed further." *Banks v. Dretke*, 540 U.S. 668, 674 (2004) (citing *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003)).

Petitioner alleges that the Court erred when it construed his Motion for Relief from Judgment as a second or successive habeas petition and transferred the motion to the Court of Appeals for determination on whether this Court is authorized to consider his claims. Petitioner maintains that the new evidence which he sought to submit in his Motion for Relief from

Judgment goes to the Court's procedural ruling that his Habeas Petition was time-barred.

Therefore, according to Petitioner, his motion was not a second or successive habeas petition.

Reasonable jurists could debate whether Petitioner's post-judgment motion asserted a "claim," as that term is defined in *Gonzalez v. Crosby*, 545 U.S. 524, 530-32 (2005), or whether, as Petitioner maintains, the motion challenged a procedural defect in the habeas proceedings, that is, the Court's failure to reach the merits of his habeas claims. The issue warrants encouragement to proceed further. Accordingly, Petitioner's Application for a Certificate of Appealability [Doc. 71, June 12, 2008] is **GRANTED**.

S/Arthur J. Tarnow

Arthur J. Tarnow

United States District Judge

Dated: July 2, 2008

I hereby certify that a copy of the foregoing document was served upon parties/counsel of record on July 2, 2008, by electronic and/or ordinary mail.

S/Catherine A. Pickles

Judicial Secretary